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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH, MICHAEL B. HINCKLEY, JACQUELINE T. HLADUN, MARILYN J. CRAIG, JEFFERY P. CLEVENGER, and TIMOTHY C. KAUFMANN, individually and on behalf of those similarly situated,

Plaintiffs,

vs.

MICRON ELECTRONICS, INC., a Minnesota corporation,

Defendant.

Case No. CIV 01-0244-S-BLW MHW

PLAINTIFFS' RESPONSE TO DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: WILLFULNESS FILED ON AUGUST 24, 2004

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Plaintiffs, by and through their counsel of record, hereby provide their Response to Defendant Micron Electronics, Inc.'s Cross-Motion for Partial Summary Judgment Re: Willfulness. In addition, Plaintiffs rely on the Plaintiffs rely on their Motion for Conditional Certification (docket #75), Plaintiffs' Brief in Support of Motion for Conditional Certification (docket #76), Plaintiffs' Statement of Material Facts (docket #77), Affidavit of William H. Thomas (docket #78), Affidavit of Christopher F. Huntley (docket #79), Plaintiffs' Brief in Opposition to Defendant's Motion for Partial Summary Judgment Re: Statutes of Limitation (docket # 219), Plaintiffs' Statement of Material Facts (docket #220), the accompanying Affidavit of William H. Thomas (docket #221), Plaintiffs' Motion for Partial Summary Judgment (docket #223), Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (docket #224), Plaintiffs' Statement of Material Facts in Support of Motion for Partial Summary Judgment (docket #225), and Affidavit of Williams H. Thomas Re: Motion for Partial Summary Judgment (docket #226), as well as the other facts and matters of record in this action.

INTRODUCTION

This is a collective action under the Fair Labor Standards Act ("FLSA"). On July 16, 2004, Plaintiffs filed their Motion for Partial Summary Judgment (docket #223), which argued that summary judgment was proper regarding the following issues: 1) that liquidated damages were mandated under 29 U.S.C. § 216(b) in an amount doubling Plaintiffs' total damages; 2) that Defendant's FLSA violations were "willful" under 29 U.S.C. §255(a) so as to trigger a three (3) year, rather than a two (2) year limitations period; and 3) that portions of Plaintiffs' damages must be trebled under state law. In addition to responding to Plaintiffs' motion, Defendant

Micron Electronics, Inc. ("MEI") has filed its own Cross-Motion for Partial Summary Judgment on the second issue. Despite the fact that Plaintiffs have the burden of proving that FLSA violations were willful so as to trigger the longer limitations period, Plaintiffs maintain that they, not MEI, are entitled to summary judgment on this issue. At the very least, however, Plaintiffs argue in the alternative that genuine issues of material fact exist foreclosing summary judgment for either party on this issue.

ARGUMENT

I. The Summary Judgment standard.

The summary judgment standard is well-known to the court. It is important to add, however, that "in construing the FLSA, [courts] must be mindful of the directive that it is to be liberally construed to apply to the furthest reaches consistent with Congressional direction." *Biggs v. Wilson,* 1 F.3d 1537, 1539 (9th Cir. 1993), *quoting, Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 3 L.Ed.2d (1959).

II. MEI's violations were 'willful' under the FLSA.

The FLSA mandates that "no employer shall employ any of his employees. . . for a workweek longer than forty hours unless such employee receives compensation for his employment. . ." 29 U.S.C. §207(a)(1). "Employ" is defined as including "to suffer or permit to work." 29 U.S.C. §203(g). Regulations under the FLSA caution that "work not requested but suffered or permitted is work time." 29 C.F.R. §785.11. Additionally, 29 C.F.R. §785.13 makes clear:

> In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

Employers are liable under the FLSA if they know, actually or constructively, that work is being performed. *See, e.g., Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997). As stated in *Reich v. Department of Conservation & Natural Resources*, 28 F.3d 1076, 1082 (11th Cir. 1994),

> An employer's knowledge is measured in accordance with his duty. . . to inquire into the conditions prevailing in his business. An employer does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates. . . The cases must be rare where prohibited work can be done. . . and knowledge or the consequences of knowledge avoided. In reviewing the extent of an employer's awareness, a court need only inquire whether the circumstances. . . were such that the employer either had knowledge of overtime hours being worked or else had the opportunity through reasonable diligence to acquire knowledge.

(internal quotations marks and citations omitted). As suggested by this passage, knowledge of supervisors regarding work being done is imputed to the employer. *Id.* at 1083.

If an employer willfully violates the provisions of the FLSA, the state of limitations on the employees' cause of action is extended from two to three years. 29 U.S.C. §255(a). A "violation is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *See, e.g., Chao v. A-One Medical Services, Inc.*, 346 F.3d 9087 (9th Cir. 2003), *citing, McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). It is necessary therefore to evaluate the nature of the employer's knowledge of work being performed when determining willfulness.

Typically, employers who successfully defend against a charge of willfulness have shown that they made efforts to keep up with the requirements of the FLSA but failed to do so because of reasonable, but mistaken interpretations of the law. *See, e.g., Andrews v. Dubois*, 888 F.Supp. 213, 220 (D.Mass 1995) (granting employer summary judgment on applicable limitations period because failure of employer to anticipate legal development that certain time at home would be compensable does not amount to willfulness where employer generally attempted to educate itself as to FLSA requirements); *Reich v. Gateway Press*, 13 F.3d 685 (3rd Cir. 1994) (reasonable but erroneous belief of employer that employees were exempt in close case of first impression does not amount to willfulness). The successful defense of a willfulness charge mostly occurs in misclassification cases.

Even in the sole case discussed by MEI in support of its cross-motion, the main issue was misclassification. In *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1080 (1st Cir. 1995), the First Circuit held that the district court's finding that the employer did not act willfully was not clearly erroneous. The district court had concluded that, although reporters, editors and photographers were not exempt under the FLSA, the defendant's erroneous claim of exemption was not willful, explaining "[t]his is particularly true in light of the closeness of the findings in the more recent cases concerning exemptions for those who write and edit for the media." 44 F.3d at n. 18 (quoting the district court). Although the First Circuit believed it presented a close call, the district court's finding was not clearly erroneous. 44 F.3d at 1080.

On the other hand, in the off-the-clock setting, as the Eleventh Circuit noted above in *Reich v. Department of Conservation & Natural Resources*, "[t]he cases must be rare where

prohibited work can be done. . . and knowledge or the consequences of knowledge avoided." 28 F.3d at 1082. Indeed, as suggested by MEI's failure to discuss an off-the-clock case in its cross-motion, it is difficult to find a reported off-the-clock where willfulness was not found. *See, e.g., Thiebes v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 15263 (D. Or., 2004) (discussing finding that Wal-Mart engaged in a pattern or practice of suffering or permitting its employees to work off-the-clock without compensation and that Wal-MArt acted willfully with respect to the pattern or practice).

Contrary to MEI's bald denials, the evidence garnered in discovery in this case establishes as a matter of law that MEI's willingness to "suffer or permit" off-the-clock work by inside sales representatives to the extent described in the record before the Court establishes that it violations were 'willful' as defined by the FLSA. If only a handful of employees were performing off-the-clock work or if it were only occurring in a particular department or with a particular "bad apple" supervisor, one might be able to conceive of a Defendant being liable under the FLSA, but not being found "willful." Here, on the other hand, we are presented with dozens of employees from MEI, testifying as to large amounts of off-the-clock work, across departments or groups,[1] involving many different supervisors and facilities in two different states. The sheer amount of off-the-clock work described in this case indicates willfulness on the part of MEI.

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[1] During the relevant time period, MEI had four main groups: consumer, small business, commercial and government. MEI has abandoned the defense that it was not a "joint enterprise" under 29 U.S.C. § 203(r)(1).

Moreover, the topic was discussed openly among the inside sales representatives and their supervisors. In one of the most damning pieces of evidence in the case, supervisor Mark Cox exchanged e-mails with sales representative Timothy Kaufman in August 8-9, 2000, regarding the very subject of off-the-clock work.[2] On August 8, 2000, Mark Cox wrote:

> If you are going to work a big chunk of overtime because you have to then that is when you need approval. If you decide to work an extra ½ to an hour a day or off and on because you are trying to drive your sales numbers then that is up to you and doesn't require approval/inclusion on your time sheet.

When asked to clarify, Mark Cox responded:

> What I was trying to pass on is that I am not in a position to approve much for overtime right now because of. . . budgets. So, if you are required to stay here to get something done or because you are backing someone up then I can get it approved. If YOU are choosing to work additional time because you are trying to get your sales numbers up then it is up to you and we don't have to log overtime. Does that make sense?

Countless other sales representatives had similar, if less overt, conversations with their supervisors. For instance, a consistent refrain from supervisors to sales representatives was described by Plaintiff Kimberley Smith:

> My management, [supervisor] Jaime Nava, had specifically in one instance told us in a meeting that we could only write down a certain number [of hours], but that the majority of our business came – our pay came from commission. And so it would be better to work it and not write it down because it's like treating it like your own business. You're trying to build your own business up.
>
> ***
>
> Jaime Nava in that particular meeting – and I don't remember the month – Jaime Nava told us 47 hours was really all we were supposed to record.

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[2] See, Exhibit S to the Affidavit of Daniel E. Williams filed concurrently.

Q. Did he tell you that was all the hours you were supposed to record or that was all the hours of overtime you were allowed to work?

A. That we were supposed to record.[3]

Sales representative Dale Hope testified that he "looked at my territory as my own business. I managed it" (Dale Hope 4/14/04, p. 64). David Thom testified "I treated that job like it's my own business. I'm there to sell. The commission was the key, not the hourly wage. You can't survive on that" (David Thom 5/3/04, p. 34). Sales representative Isaac Moffett added that "it's all about numbers. It didn't matter how you'd get it" (Isaac Moffett 1/14/02, p. 124).

All of the foregoing sales representatives worked at MEI's Meridian facility. Michelle Saari of MEI's Roseville, Minnesota facility testified similarly:

Q. Do you ever remember being told by one of the supervisors that you were required to work overtime?

A. Yes, but not in those words.

Q. What words would you be referring to?

A. That the work had to be done, the numbers needed to be hit, and that we were smart enough to do whatever we needed to do to make our goals.

(Michelle Saari 5/4/04, p. 64).

Marilyn Craig, also from MEI's facility in Roseville, Minnesota, testified as to similar knowledge of the part of her supervisors regarding the FLSA and off-the-clock work. Describing the reaction of her supervisor, Lori Chitwood, to off-the-clock work, Ms. Craig testified: "Her

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[3] Deposition of Kimberley Smith of 2/15/02, p. 245-46, which is attached to the Affidavit of Daniel E. Williams Re: Defendant's Cross-Motion for Partial Summary Judgment, filed concurrently. Subsequent references to deposition testimony are cited by deponent, date and page number and are found attached to the same affidavit.

understanding was, we had to work off the clock. She would get in trouble if we put down overtime, and she just assumed she'd go to jail for us not being paid overtime, but yet she pushed us to do that" (Marilyn Craig 5/5/04, p.25).

Finally, however, the sheer amount of amount of off-the-clock work belies any ignorance on the part of MEI supervisors that it was taking place. For instance, David Blair testified that he worked 6 to 7 hours per week off the clock (David Blair 7/6/04, p. 100); Alan Claflan testified that he consistently worked 9 to 10 hours per day regardless of whether any overtime was pre-approved (Alan Claflin 9/1/04, p. 82); Michael Larscheid indicated he worked 4 to 5 hours off the clock on average every week in which overtime was not approved (Michael Larscheid 7/16/04, p. 37); Charles McGuire testified that he worked 10 to 15 hours per week off the clock (Charles McGuire 8/5/04, p. 80); Chris Papero testified that he worked 10 to 12 hours per week on average off the clock (Chris Papero 7/27/04, p. 81). These individuals worked in different groups for different supervisors.

MEI's feigned ignorance of the rampant off-the-clock work described by the sales representatives should not create a genuine issue of material fact so as to defeat Plaintiffs' original motion for summary judgment on this issue. There is no doubt, however, that Defendant is not entitled to summary judgment.

III. In the alternative, whether MEI's violations were 'willful' presents a genuine issue of material fact.

In the alternative, the question of whether MEI's FLSA violations were 'willful' requires a factual inquiry best left for the jury. Frequently, courts have held that the issue of willfulness presents fundamentally a fact question for the jury, rather than a legal one for the court, even

though the court is charged with evaluating the "good faith" defense for purposes of liquidated damages. *See, e.g., Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995) (in an FLSA case, "[i]t is the jury's province to decide which limitations period. . . applies in light of the plaintiff's evidence"). This line of cases suggests very strongly that the issue of willfulness involves a factual inquiry necessitating a full record rather than a summary procedure.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's cross-motion for partial summary judgment re: willfulness.

DATED this 4th day of October, 2004.

HUNTLEY PARK, LLP

Daniel E. Williams
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of October, 2004, a true and correct copy of the foregoing instrument was served upon opposing counsel as indicated below:

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October 18, 2004

VIA FACSIMILE (208) 334-9209

Honorable B. Lynn Winmill, Chief Judge
United States District Court
550 West Fort Street
Boise, Idaho 83724

RE: Shaw v. Dauphin Graphic Machines
District of Idaho Case No. CV-03-390-E-BLW

Dear Judge Winmill:

This letter is necessitated by the letter to you dated October 15, 2004 by Joel E. Tingey, attorney for plaintiff Estate of Jason Shaw. We note that Mr. Tingey represented to you our client's willingness to participate in the court mandated ADR, scheduled long before our client was joined as a party. When we were first retained, on August 9, 2004, we were informed by counsel for defendant Dauphin Graphic Machines ("DGM") that there was a mediation scheduled with Judge N. Randy Smith on September 10, 2004. Recognizing that it would be difficult to be prepared to participate meaningfully on such short notice, we nevertheless determined not to ask that the mediation be vacated.

In fact, it was Mr. Williams, counsel for defendant DGM who first broached the subject of postponing the mediation in a letter of August 17, 2004. It was also by way of another letter on August 17, 2004 that Mr. Williams proposed a stipulation extending deadlines 60 days in order to accommodate the plaintiff and defendant in determining how to deal with the addition of another party to the action. Given the lateness of the joinder in the overall schedule, we were unwilling to be placed on the same schedule and would not agree to only have 60 days. Mr. Tingey declined to consider a longer time, and we were compelled to resolve the question by way of motion [Docket 35], placed his declination on the record [Docket No. 36]. Our reply memorandum was filed September 13, 2004 [Docket 37] and this issue is still awaiting resolution.

Even then, we did not insist on vacating the mediation, but agreed that if the other parties wanted to do so we would work on arriving at another ADR proposal. As the scheduling issue has remained unresolved, and our understanding of the facts of the case has not been fully clarified, we have been forced to conclude that we cannot be assured of being able to correctly advise our client of the relative risks and benefits of proposals to be encountered at mediation by mid December 2004. As a result, we have not been able to stipulate to the early settlement conference proposed by Mr. Tingey.

We believe that the court should take up the matter of the scheduling order, and in a comprehensive fashion deal with ADR and all pretrial issues. Should the court elect to treat a status conference as an "ADR Conference" we would be glad to present our position in greater detail than provided in this correspondence.

Sincerely,

Donald L Harris, Esq.

c: Robert D. Williams
Joel E. Tingey

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FACSIMILE TRANSMITTAL SHEET

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NUMBER OF PAGES, INCLUDING THIS COVER SHEET: 12

FROM: Beverly Li, law clerk
Judge Thomas G. Nelson

COMMENTS: